IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

WA.No. 458 of 2007(A)

AGAINST THE JUDGEMENT IN WPC.25451/2006 Dated 19/02/2007
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APPELLANT: PETITIONERS.
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1. JOSEPH ZACHARIAS, S/O. JOSEPH,
   AGED 39 YEARS, ADDL.GOVT.PLEADER AND ADDL. PUBLIC PROSECUTOR,ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-I) COURT, KALPETTA, RESIDING AT MARIVELIL HOUSE, SEETHA MOUNT P.O., PULPALLY, WAYANAD.

2. K.C. JOSHUA,
   ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-II) COURT, PATHANAMTHITTA, RESIDING AT MUMBILKULANGARA HOUSE, ELANTHOOR P.O., ELANTHOOR.

3. T.A. SANTHOSH,
   ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-II)COURT, THODUPUZHA, RESIDING AT THEVARKUNNAL HOUSE, JHUDANGANADU P.O., MUTTOM, THODUPUZHA.

4. JOHNY JOSE,
   ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-I) COURT, KOTTAYAM, RESIDING AT NIDHIRI PUTHANPURA,KOZHA P.O KURAVILANGAD.

5. K.P. RAJEEVAN,
   ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST. & SESSIONS FAST TRACK (ADHOC-I) COURT,

ERNAKULAM, RESIDING AT KALLIKKADAVIL HOUSE, VI/296-(1), MADHAVAN PERIYAR LANE,NEAR BANK JN. ALUVA-683101.

6. SMT.JESSY GEORGE, ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-II) COURT, ERNAKULAM, RESIDING AT THAYIL OLIVE VILLA, PALACE NAGAR ROAD, THEKKUMBHAGAM, TRIPUNITHURA.

7. SMT. LEENA JAYASURIAN, ADDL.GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL. DIST.& SESSIONSS FAST TRACK (ADHOC-I) COURT, TRICHUR, RESIDING AT JAYA NIVAS, THIRUVANATH ROAD, AYYANTHOLE P.O., TRICHUR-680003.

8. PIOUS MATHEW, ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL. DIST. & SESSIONS FAST TRACK (ADHOC-I) COURT, TRICHUR, RESIDING AT VARAMBHILAKAM HOUSE, P.R. PADY, EDAKKUNNI VILLAGE, THYKKATTUSSERY P.O., OLLUR, TRICHUR.

9. SAJU GEORGE, ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL. DIST.& SESSIONS FAST TRACK (ADHOC-I) COURT, MANJERI, RESIDING AT EMPARANYIL HOUSE, PANAMPILAVU P.O., AREACODE, MALAPPURAM.

10. V. SAJAN PRASAD, ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL.DIST.& SESSIONS FAST TRACK (ADHOC-II) COURT, TRIVADNRUM, RESIDING AT ELDAD, CHITTAZHA, VATTAPPARA P.O., TRIVANDRUM.

11. K.T. GEORGE, ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL. DIST.& SESSIONS FAST TRACK (ADHOC-II) COURT, KALPETTA, RESIDING AT KUZHIVELIL HOUSE, SULTHAN BATHERY, WAYANAD.

12. AZAD ARYADAN, ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR, ADDL. DIST.& SESSIONS FAST TRACK (ADHOC-III)COURT, MANJERI, RESIDING AT ARYADAN HOUSE, EDAKKARA, MUNDA P.O., VAZHIKKADAVU VILLAGE, NILAMBUR.

13. K.T. ANTONY,
ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR,
ADDL. DIST.& SESSIONS FAST TRACK (ADHOC-II) COURT,
PALAKKAD,RESIDING AT MARIA BHAVAN,GOVINDAPURAM P.O
PARUTHIKKAD, PALAKKAD.

14. K.A. AUGUSTIINE JOSEPH,
ADDL. GOVT.PLEADER AND ADDL.PUBLIC PROSECUTOR,
ADDL. DIST.& SESSIONS FAST TRACK (ADHOC-I) COURT,
THODUPUZHA, RESIDING AT KUMBALATH HOUSE,
IDIYANAL P.O., RAMAPURAM, PALA.

BY ADV. SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.K.A.BALAN
SRI.PETER JOSE CHRISTO
SRI.S.A.ANAND

RESPONDENT:RESPONDENT

STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF LAW
(INSPECTION WING), GOVERNMENT SECRETARIAT,
TRIVANDRUM-695001.

BY ADVOCATE GENERAL SHRI. C.P.SUDHAKARA PRASAD

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 9/03/2007, THE COURT ON 14/3/2007 DELIVERED THE
FOLLOWING:

P.R. Raman & Antony Dominic, JJ.

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W.A.No.458 of 2007

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Dated this the 14th day of March, 2007.

JUDGMENT

Antony Dominic,J.

This appeal is filed by the writ petitioners who had approached this Court seeking a direction to the respondent not to proceed further with the drawing up of fresh panel of advocates for appointment as Additional Government Pleaders/ Additional Public Prosecutors in the Fast Track Courts pursuant to Ext.P4. They also sought a declaration that they are entitled to hold the post of Additional Government Pleaders/ Additional Public Prosecutors during the currency of the Fast Track Courts. The writ petition having been dismissed by judgment dated 19th February 2007, this appeal is filed.

2. The facts of the case are that by Ext.P1 order dated 22.12.2001, the respondent had accorded sanction for the establishment of 26 Fast Track Courts in the State for a period from 2001-02 to 2004-05 as per the recommendation of the 11th Finance Commission. By the said order sanction was also accorded for the creation of various posts, including that of Additional Public Prosecutor in each of the courts. It was pursuant to Ext.P1 that the Fast Track Courts were established in the state and Ext.P3 and similar orders were issued appointing the petitioners as Additional Government Pleaders and Additional Public Prosecutors in the Fast Track Courts. The period of appointment was 3 years from the date of assumption of charge and the conditions of service, duties etc., have been

specified as envisaged in the rules issued under Government Order dated 25.01.1978 and as amended from time to time. Subsequent their appointment, the respondent issued Ext.P2 order directing that in modification of their earlier order dated 30.07.2002 that the Additional Government Pleaders and Additional Public Prosecutors of the Fast Track Courts to attend the work of that court exclusively. It is also stated that on the expiry of the initial period of appointment of 3 years, orders were issued by the Government, extending their tenure for a further period of 3 years and Ext.R3(a) is one such order issued in the case of Sri.Rajeevan. K.P. Appellants have in the writ petition given a chart indicating the initial period of their appointment, extended period of their appointment, expiry of their term of appointment and the court to which they were appointed. From this, we note that the extended period of appointment of Appellant Nos.6 and 8 expired on 13.11.2006 and 16.11.2006 respectively and that the extended period of appointment in respect of the others is yet to expire.

3. It was while so that Ext.P4 letter was issued by the Law Secretary to the Government of Kerala requesting the District Collectors to furnish a panel of qualified Advocates for being considered for appointment as District Government Pleaders, Public Prosecutors, Additional Government Pleaders and Additional Public Prosecutors in all District Court Centers, Additional District centers and Sub Court centers. It is stated that on receipt of Ext.P4, the respective District Collectors took action in pursuance thereto and contending that the Appellants are entitled to be continued during the currency of the adhoc Fast Track Courts, they submitted Ext.P6, a joint representation to the Respondent which did not evoke any response. As they apprehended that the following the finalisation of fresh panel of Advocates, their appointments will be terminated, the writ petition was filed seeking the relief's mentioned earlier.

4. The respondent filed a detailed counter affidavit asserting that the appointment of the appellants were in accordance with the provisions of the Kerala Government Law Officers (Appointment and Conditions of Service) Rules 1978 (hereinafter referred to as the 'Rules") and that as per Rule 17 of the said rules, the respondent can at any time terminate the service of any government law officer without assigning any reason. It was also stated that the Government has the right to change its advocates and appoint any other lawyer, in whom the government has confidence. It was also stated that the establishment of Fast Track Courts and its term cannot be clubbed with the terms and duties of an advocate appointed in that court and that the Appellants are governed by the Rules and there was no distinction with other Additional Government Pleaders and Additional Public Prosecutors, appointed in other courts. It was contended that their tenure is not co-terminus with the Fast Track Courts and that the Appellants have no cause of action for invoking the extra ordinary jurisdiction of this Court under Article 226 of the constitution of India.

5. It was stated that "the government intends to appoint Government Pleaders, whom they have sufficient confidence and who are sufficiently competent. After the petitioners initial appointment so many lawyers have qualified for being considered for appointment as District Government Pleaders and Additional District Government Pleaders. The government is justified in selecting the best talent available for representing them. It is a policy decision of the government to appoint more competent lawyers and lawyers on whom the government have sufficient confidence as Government Pleaders. The decision of the

government, it is respectfully submitted, cannot be subjected to judicial review". Proceeding further it is stated that "the appointment of petitioners as Government Pleaders is only a professional engagement and not an appointment to a civil posts. The relation of the government and the petitioners is basically that of a client and a lawyer. Even a good performance by the present pleaders is of no consequence and the decision of the client to change the lawyer cannot be subjected to judicial review". The petitioners have filed a detailed reply affidavit controverting the averments in the counter affidavit.

6. At the time when the writ petition was heard by the Learned Single Judge, the grounds urged that;

(i) The Additional Government Pleaders and Additional Public Prosecutors in Fast Track Courts belonged to a distinct class or category and are entitled to be treated differently from those appointed in the ordinary Civil and Criminal Courts.

(ii) The service of the appellants shall not be terminated in exercise of Rule 17 of the Rules as it does not govern their conditions of service.

(iii) The proposed termination of the services of the appellant was for the only reason of political change of government and thus the discretion vested in the government has been improperly exercised rendering the impugned action illegal.

(iv) It was contended that unless the petitioners were unfit to hold the post there was no warrant for the preparation of a fresh panel.

(v) It was contended that since the constitution of the Fast Track Courts is under a Scheme funded by the Central Government prior sanction of that government was necessary for dispensing with their services.

(vi) Lastly it was contended that the appellants having been appointed on an adhoc basis cannot be replaced by another batch of adhoc appointees.

The Learned Single Judge rejected all the contentions and by judgment dated 19.02.2007 dismissed the writ petition.

7. We heard the counsel for the Appellants Mr. S.P. Aravindakshan Pillai and the learned Advocate General for the Respondent State.

8. Although the judgement is sought to be impugned on all the grounds which were urged before the Learned Single Judge, the counsel for the Appellants confined himself to the arbitrariness in the manner in which the services of the Appellants were sought to be dispensed with. It was pointed out that though the Appellants approached this court apprehending termination following the preparation of fresh panel pursuant to Ext.P4, immediately on the dismissal of their writ petition, their services were terminated and thus their apprehensions came true. According to the counsel, the termination thus effected by a single stroke of pen is an arbitrary exercise of power and therefore this court should intervene. Heavy reliance was placed on the judgment of the Supreme Court in Srilekha Vidyarthi Vs. State of UP (1991 (1) SCC 212) and the decision of this Court in the case of Mohammed Ashraf Vs. State of Kerala (1991 (2) KLT 818).

9. On the other hand the Learned Advocate General would argue that in the matter of appointment of its counsel, be it an Additional Government Pleader or Additional Public Prosecutor, the choice is that of the Government and that none can claim a right to be appointed or continued.

It was contended that the nature of office held by a lawyer vis-à-vis the Government is in the nature of a professional engagement and that the question as to whether the State is satisfied with the performance of its counsel or not, is a matter between the State and the Counsel. The Advocate General asserted that the object of the impugned action was only to select the best talent available for representing the State and of people to whom the State can have more confidence. The learned Advocate General also sought to draw support from the judgments relied on by the counsel for the Appellants and in addition, he relied on the Supreme Court judgment in the case of State of UP Vs. Johry Mal (2004 (4) SCC 714) and the judgment of this Court in W.P.(C)No.19013 of 2004 as confirmed in W.A.No. 1364 of 2004.

10. We have considered the submissions made by the counsel for the Appellants and the learned Advocate General.

11. The appointment of the Appellants were initially by Ext.P3, and was extended by subsequent Government Orders. The appointment order itself disclose that their conditions of service duties etc will be as envisaged under the Kerala Government Law Officers (Appointment and Conditions of Service) Rules 1978 and as amended from time to time. Rule 17 of the Rules, provide that notwithstanding anything contained in the rules, the Government may terminate the appointment of any Government Law Officer other than a Special Government Pleader or Special Public Prosecutor, at any time before the expiry of the term of his appointment without assigning any reason therefore, on giving one month's notice or on payment of one month's salary, in lieu of such notice. Thus the rules, which governed their conditions of service, enabled the Government to

effect premature termination of the services of the Appellants and this position, as rightly found by the Learned Single Judge, is beyond dispute.

12. The learned Advocate General contended for the position that the expression "without assigning any reasons" occurring in Rule 17 conferred on the government absolute and unbridled power to terminate the services of any of the appointees. We are not in a position agree with this submission. In ***Shrilekha Vidyarthi's*** **case** the Supreme Court had occasion to consider almost a similar provision as contained in the Legal Remembrancer's Manuel and held as follows:

> "The expression "at any time" merely means that the termination may be made even during the subsistence of the term of appointment and 'without assigning any cause' means without communicating any cause to the appointee whose appointment is terminated. However, 'without assigning any cause' is not to be equated without existence of any cause. It merely means that the reason for which the termination is made need not be assigned or communicated to the appointee. It was held in Liberty Oil Mills Vs. Union of India that the expression 'without assigning any reason' implies that the decision has to be communicated, but reasons for the decision have not to be stated; but the reasons must exist, otherwise, the decision would be arbitrary. The non assigning of reasons or the non communication thereof may be based on public

> policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against public policy".

In view of the law laid down by the Supreme Court, we have no doubt in our mind that the State cannot without the existence of valid reasons, which need not be communicated to the appointee, prematurely terminate the appointment of the Appellants.

13. Since both sides have relied on heavily and referred extensively, the judgment of the Supreme Court in ***Shrilekha Vidyarthi's*** **case**, a closer scrutiny is called for. The facts of that case are that by a general order the appointment of all Government Counsel in all the districts of the State of UP were terminated w.e.f. 20.08.1990 and the Government of Uttar Pradesh directed preparation of fresh panel to make appointments in place of the existing incumbents. The validity of the state action was challenged before the Alahabad High Court and on rejection thereof, appeals were filed in the Supreme Court. The Supreme Court, after making reference to the various provisions contained in the Legal Remembrancer's Manual, which governed and regulated the appointment of all government counsel and the provisions of Section 24 of the Code of Criminal Procedure 1973, examined the validity of the circular dated 28.02.1990. The judgment was rendered holding that the circular must perish on the ground of arbitrariness which is an available ground for judicial review and it was directed that the all the existing appointees must continue in office and be dealt with in accordance with the procedure laid down in the LR Manual.

14. Examining the issue as aforesaid, it has been held that;

> "there can be no doubt that the function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the code of criminal procedure undoubtedly invests the Public Prosecutors wit the attribute of holder of a public office which cannot be whittle down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it".

15. Proceeding further, referring to precedents, it was held that the duties of a Government Pleader are of a public nature and that the office of a Government Pleader is a public office. On this reasoning it was held that;

> "We are, therefore, unable to accept the argument of the learned Additional Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the government excluding judicial review. We have already indicated the presence of public element attached

> to the 'office', or 'post' of District Government Counsel of every category covered by the impugned circular. This is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review".

16. After the Supreme Court judgment was rendered, this court also had occasion to deal with an almost identical situation in **Mohammed Ashraff** Vs. **State of Kerala** (1991 (2) KLT 818). Following the change in the State Government in June 1991, the Government decided that the Government Pleaders then in office were to be terminated and that fresh appointments will have to be made with sufficiently competent people in whom the government had sufficient trust and confidence. Following this, notices were issued to the Government Pleaders, stating that their appointment will stand terminated on the expiry of the period. It was challenging the notices, original petitions were filed in this Court. The State justified its action contending that the service of the persons concerned were not required any more and Government did not have the same confidence and trust which they should have in the lawyer of the state Government. It was contended that even assuming that the Government Pleader was discharging his functions properly and efficiently and there was no room for any complaint against him, it is still open to the Government to terminate his appointment and appoint persons who are sufficiently competent and in whom the Government has sufficient trust and confidence.

17. After referring to the judgment in the case of ***Shrilekha Vidyarthi*****,** this court held that;

> "Therefore, Shrilekha Vidyarthi's case is to be treated as a case where, on account of a single omnibus order of termination assigning no reason and on account of no other good reasons being otherwise assigned, the order was treated as ex facie arbitrary or one where arbitrariness was writ large, and the burden held shifted immediately to the State and remained undischarged in as much as no valid reasons were given or existed. That case was again not a case of the Government passing individual termination orders, applying the mind to each case separately."

18. Applying the ratio of the judgment of the Supreme Court and holding it to be clearly distinguishable on facts, it was held that;

> "Government, it is stated, wanted to appoint persons in whom it had sufficient confidence and who, according to the Government, had sufficient competence. The case before us is not a case where there is ex facie arbitrariness and there is no question of the burden straightaway being shifted to the State. Even assuming that the burden shifted to the State at some stage, it has, in our view, been sufficiently discharged by the State by assigning various plausible reasons based on Government's policy. Review of the wisdom of such a policy or the lack of it or the desirability of a better alternative is not

within the permissible scope of judicial review".

On this basis, the notices issued were held to be not arbitrary or offending Article 14 of the Constitution of India and on that basis the original petitions were dismissed.

19. Pausing here, we should concede to the position that in the ***Shrilekha Vidyarthi's*** **case** the Supreme Court had deprecated the enmass termination as seemingly resorting the Spoils System alien to our constitutional scheme. If we are to rest our conclusion only on the basis that the appointment of Additional Government Pleaders and Additional Public Prosecutors in the Fast Track Courts in Kerala are attached with the presence of public element to the office or post held by them, their premature termination cannot be justified as one merely being contractual or a professional engagement between a client and his lawyer.

20. But we notice that the position as held by the two member Bench of the Supreme Court in the ***Shrilekha Vidyarthi's*** **case** has undergone a sea-change when a 3 member bench of the Court rendered its judgment in the case of **State of UP** Vs. **Johri Mal** (2004 (4) SCC 714). That case arose out of the claim by Public Prosecutors/ District Government Counsel appointed by the State of Uttar Pradesh for renewal or extension of their tenure. After surveying the provisions of the Code of Criminal Procedure 1973, UP Legal Remembrancer's Manual and the provisions of UP Act 18 of 1991 by which the State of UP amended Section 24 of the Code of Criminal Procedure, examining the nature of office held by District Government Pleader and Public Prosecutor, the Supreme Court held as follows:

> "In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law, the court may interfere. The court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason dehors the statute."

21. Thus in the matter of appointment of its counsel, the state has the right to choose, the best talent and the people, who enjoy their trust and confidence. As disclosed in the counter affidavit, and accepted by the Learned Single Judge, the endeavour of the State is to select best talent and people, who are worth reposing more confidence. According to the State it is a policy decision of the government to appoint more competent lawyers.

22. True we agree that the government has the initial burden of satisfying this court that the power of termination available in Rule 17 of the Rules has been exercised for reasons which are existing, consistent with the constitutional scheme. In our view, by disclosing the reasons which prompted them to issue Ext.P4, the state could satisfy this court of the existence of reasons and by this they have discharged their burden sufficiently. If it is a matter of policy, a review of the wisdom of such a policy or desirability of a better alternative is beyond the scope of judicial review.

23. As held by the Supreme Court in the matter of appointment of Counsel by the State, be it an Additional Government Pleader or an Additional Public Prosecutor, the choice is that of the Government. If the Government has decided not to continue the appointment of the Appellants, this court will not be justified in thrusting upon an unacceptable counsel on an unwilling client. We are conscious that in a matter like this, the scope of judicial review is limited and is available where the state has failed in discharging its public duty, where the state has departed from its legal policy, where the state has not complied with mandatory provisions of law and where the state has removed the Appellants dehors the statute. On an anxious consideration of the case in its entirety, we are satisfied that the Appellants have not made out a case for judicial review and that the Learned Single Judge has rightly dismissed the writ petition.

The aforesaid reasons we do not find any merit in this appeal and the appeal will stand dismissed.

P.R.Raman,
Judge.

Antony Dominic,
Judge.

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